IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 8296 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE

HONOURABLE MR.JUSTICE K.A.PUJ

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

==========

HATHISING MFG. CO.LTD. & 1 - Petitioners
Versus
UNION OF INDIA THR' SECRETARY & 2 - Respondents

==========

Appearance :
MR HARDIK MODH FOR MR PARESH M DAVE for Petitioners
MR JITENDRA MALKAN for Respondent No. 1.
DS AFF.NOT FILED (N) for Respondent(s) : 2,
NOTICE SERVED BY DS for Respondent(s) : 3,

==========

CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 03/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1.Rule. Mr. Jitendra Malkan, learned Assistant Solicitor General waives service of rule on behalf of respondent No. 1.

2.Since the issue involved in this petition is in very narrow compass, the matter is taken up for final hearing.

3.The petitioner has filed this petition under Article 226 of the Constitution of India praying for quashing and setting aside the order dated 24.09.2004 passed by CESTAT, Mumbai.

4.It is the case of the petitioner that as the credit of duties paid on inputs used in relation to the manufacture of yarns sold under exemption to Regd. Co-operative Societies in plain reel hanks would not be available, the petitioner company did not avail credit of duties paid on these quantities of fibers which were used in relation to yarns cleared under the above exemption and also maintained accounts of such transactions. A show cause notice was issued proposing to recover amount of Rs.6,83,313/- on the ground that the petitioner company has taken this amount as credit regarding duties paid fibers used in the manufacture of exempted yarns sold and supplied under Notification No. 26/94. The Assistant Collector of Central Excise passed an adjudication order on 23.11.1995 confirming the above demand with penalty of Rs. 50,000/-.

5.Being aggrieved by the said order, the

petitioner company filed appeal before the Commissioner (Appeals) and the Commissioner (Appeals) vide his order dated 24.01.2000 dismissed the said appeal without giving any ground or reason for not considering the petitioner's submission and evidence including the Chartered Accountants' certificate.

6.Being further aggrieved by the said order of the Commissioner (Appeals), the petitioner preferred appeal before the Appellate Tribunal and the Tribunal has also dismissed the appeal of the petitioner.

7.While dismissing the appeal of the petitioner, the Tribunal has observed in its order dated 23.02.2004 that the issue was merely of establishing a fact as to whether or not the petitioner has taken Modvat credit in respect of the duty paid on the raw materials, namely, fiber, used in the manufacture of exempted

goods. The Tribunal has further observed that this could very well be established from the RG-23 Part-II record and needs no other certifying authority. However, instead of sending this matter to the adjudicating authority for verification of the RG-23 Part-II record , the Tribunal has dismissed the appeal by holding that the petitioner was skirting the issue and this shows that the petitioner had no defence.

8.It is this order which is under challenge in the present petition.

9.Mr. Hardik Modh, learned advocate appearing for Mr. P.M. Dave for the petitioner has submitted that during the pendency of the petition, though certain documents were called for, the same could not be traced out. The petitioner made it clear vide letter dated 24.02.2006 that on the basis of RG23A Part-I and II, it can be

established that the petitioner had not taken credit of inputs of fibers used for yarns sold under exemption. It is further stated that the Tribunal has held in order dated 23.02.2004 that this fact can very well be established from the RG23 Part II record and it needs no other certifying authority.

10.Mr. Modh has further invited the attention of the Court to Rule 57 G (7) of the Central Excise Rules, 1944 which says that a manufacturer of the final products shall maintain, (a) an account in Form RG 23A, Parts I and II; (b) in respect of duty payable on final products, an account-current with adequate balance to cover the duty of excise payable on the final products cleared at any time. On the basis of this rule, Mr. Modh has submitted that the petitioner has maintained the requisite registers and it has always been filed with the returns. This was never demanded

and the petitioner was of the bonafide view that the Certificate of the Chartered Accountant was good enough to allow this claim. However, for the first time before the Tribunal, the issue was raised and hence, in the interest of justice, the matter may be remanded to the adjudicating authority before whom such register may be produced so as to enable him to entertain and decide the claim of the petitioner.

11.Mr. J.M. Malkan, the learned Assistant Solicitor General, on the other hand, has opposed the present petition. He has raised the preliminary objection that the petition is not maintainable under Article 226 of the Constitution of India as efficacious alternative remedy is available to the petitioner. The petitioner can file Tax Appeal before this Court. In support of this submission, he relied on the decision of the

Hon'ble Supreme Court in the case of *Serai Kella Glass Works Pvt. Ltd. V/s. Collector of Central Excise, Patna, (1997) 4 S.C.C. 641* wherein it is held that the High Court should not interfere, in tax matters, by exercise of writ jurisdiction where alternative efficacious remedies are available.

12.Mr. Malkan has further submitted that this Court vide order dated 21.01.2006 observed that the petitioner has been able to produce some of the documents and time was sought for to produce rest of the documents. However, the said documents have not been produced and hence, no useful purpose would be served to remand the matter again to the adjudicating authority. If the petitioner is in possession of the said documents, the same can very well be examined by the adjudicating authority even during the pendency of this petition and its claim can be entertained. He has, therefore,

submitted that once the matter has reached to finality upto the stage of Tribunal, there is no need to remand the matter back to the adjudicating authority.

13.After having learned advocates appearing for the respective parties and after having gone through the relevant rules and the papers and pleadings of the parties, we are of the view that the Tribunal has dismissed the appeal only on the short point that RG-23 certificate could not have been verified and instead of sending the matter back to the adjudicating authority, dismissed the appeal. It is the say of the petitioner that RG-23 register shall be produced before the adjudicating authority and the petitioner is in a position to satisfy the authority that the petitioner has not availed of Modvat credit. Even Rule 57 G (7) deals with the said aspect and if these registers are maintained, it can very well be found from the

said registers that Modvat credit has been availed of or not. We are, therefore, of the view that proper verification of RG-23 A Part I & II registers are required to be made. As far as the other documents which are referred to in the letter dated 10.01.2006 are concerned, at this stage, it is difficult to say that whether they are relevant for the purpose of deciding the issue in question. However, while examining RG-23 A Part I and II Certificates, the adjudicating authority will go into this aspect if without the help of those document, the issue can not be decided in that case, he may ask for the said documents after justifying the necessity thereof.

14.So far as Mr. Malkan's objection with regard to alternative efficacious remedy is concerned, it is true that the petitioner could have filed an appeal before this Court. However, looking to the issue involved in this petition and

since there is no blanket ban on the exercise of power under Article 226 of the Constitution of India that in no case, the petition under Article 226 of the Constitution of India cannot be entertained. We are of the view that interest of justice would better be served if the matter is remanded to the adjudicating authority for verification of the claim of the petitioner in light of RG-23 A Part I & II registers for the period which is under consideration and on that basis, the adjudicating authority will decide as to whether Modvat credit was availed of or not by the petitioner.

15.With the aforesaid direction, we quash and set aside the impugned order of the Tribunal and remand the matter to the adjudicating authority to decide the issue and take appropriate decision on the basis of the material on record.

16.Before parting, it is necessary to observe here that this Court vide order dated 14.10.2005 directed the respondent authorities to deposit a sum of Rs. 750/- towards costs with the Registry of this Court on or before 21.10.2005. It appears that the said amount has still not been deposited. Though the petition is being disposed of today, the respondent authorities are hereby directed to deposit the said amount with the Registry of this Court on or before 17.03.2006. After the said amount is deposited before this Court, it is open for the petitioner to withdraw the same.

17.With the aforesaid observation and direction, this petition is accordingly disposed of. Rule made absolute with no further order as to costs.

S*avariya* **[A.R. DAVE, J.] [K.A. PUJ, J.]**